

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 99-406-8
	:	
JUAN LUGO	:	

MEMORANDUM ORDER

After the government proffered evidence in connection with a proposed guilty plea by defendant Lugo, the court expressed its reservations about whether that evidence constituted an independent basis in fact satisfying the essential elements of the crime of conspiracy as charged in the indictment. The government was given further time to determine whether additional evidence exists and to reassess its position.

Defendant Lugo is charged with participating in a conspiracy to distribute cocaine as part of a substantial cocaine distribution enterprise organized and managed by co-defendants Damien De Laluna and Efrain Matos. Mr. Lugo is also charged with use of a telephone to facilitate that conspiracy.

The evidence proffered by the government is as follows. On February 15, 1999 Mr. Lugo called Mr. De Laluna to inquire on behalf of an interested friend what the current price would be for a half kilogram of cocaine which the unidentified and unindicted friend was interested in obtaining for resale. Mr. De Laluna responded that the cost was approximately \$16,000 but he would have to get back to Mr. Lugo with a precise figure. There

is no evidence that between February 15, 1999 and July 14, 1999, when the indictment herein was returned, Mr. De Laluna ever got back to Mr. Lugo or of any further action by Mr. Lugo or his friend actually to acquire cocaine from Mr. De Laluna or any other member of the alleged conspiracy. It also appears that over a prior period of several months, Mr. Lugo had purchased on credit from Mr. De Laluna quantities of marijuana for approximately \$800.

It is difficult conscientiously to conclude from such evidence that Messrs. De Laluna and Lugo entered into a conspiracy or agreed to work together to distribute cocaine. An agreement between a seller to sell and a buyer to buy a quantity of cocaine for distribution by the buyer does not sustain a conspiracy charge. See U.S. v. Gibbs, 190 F.3d 188, 197 (3d Cir. 1999), U.S. v. Gore, 154 F.3d 34, 40-41 (2d Cir. 1998); U.S. v. Lennick, 18 F.3d 814, 819 n.4 (9th Cir. 1994); U.S. v. Price, 13 F.3d 711, 727 (3d Cir. 1994); U.S. v. Lechuga, 994 F.2d 346, 349 (7th Cir. 1993). In the instant case, there is a mere inquiry by Mr. Lugo as to what it would cost to obtain a quantity of cocaine. It is similarly difficult to conclude that the use by Mr. Lugo of a telephone to make that inquiry facilitated a conspiracy with Mr. De Laluna to distribute cocaine.

The government has now advised the court that it proposes to drop the present charges against Mr. Lugo and to

recharge him with attempting to possess cocaine with intent to distribute, and using a telephone to facilitate that offense. Without knowing precisely what transpired between Mr. Lugo and his unidentified friend, it is difficult to discern whether such charges are sustainable. It is clear, however, that evidence of a defendant's expression of interest in buying cocaine or even an agreement to buy cocaine for a specified price is alone insufficient to sustain an attempt to possess with intent to distribute charge. See U.S. v. Yossunthorn, 167 F.3d 1267, 1272-73 (9th Cir. 1999); U.S. v. Cea, 914 F.2d 881, 887-88 (7th Cir. 1990); U.S. v. Delvecchio, 816 F.2d 859, 862 (2d Cir. 1987); U.S. v. Joyce, 693 F.2d 838, 842 (8th Cir. 1982). Also, of course, one cannot be guilty of using a telephone to facilitate an attempt which did not occur.

Without knowing the details of what transpired between Mr. Lugo and his friend, the court also cannot assess whether Mr. Lugo and his friend may have conspired or agreed to obtain or possess for distribution a quantity of cocaine at or before the time of Mr. Lugo's call to Mr. De Laluna. An attempt requires a "substantial step" toward commission of an offense. Yossunthorn, 167 F.3d at 1271; Delvecchio, 816 F.2d at 861-62. No overt action is required to sustain a drug conspiracy charge under 21 U.S.C. § 846. The agreement itself is the actus reus. See U.S. v. Shaboni, 513 U.S. 10, 16-17 (1994).

It does appear that the government has sufficient evidence to sustain a conviction of Mr. Lugo for possession for distribution of marijuana, a felony which for whatever reason it has elected not to charge.

ACCORDINGLY, this day of February, 2000, **IT IS HEREBY ORDERED** that the parties have until February 17, 2000 to assess, confer and advise the court as to how each plans to proceed in this matter.

BY THE COURT:

JAY C. WALDMAN, J.